INDISCRIMINATE PRIVACY

(Paper for conference De Facto Discrimination hosted by Centre for Human Rights Studies, University of Pretoria, 21 October 1992)

The Population Registration Act, which brought about a system of race classification whose ornate complexity has seldom been matched in our law, has now been repealed. The party which procured its repeal now boasts of its achievement in having done so, and expects us to forget that it is also the party which procured its enactment.

About twelve years ago, I used to give lectures on the South African race classification system. I used to have to explain that the system divided all South Africans into three major groups - white, black and coloured. Whites were defined, blacks were defined, and those who were called coloured were defined as people who were neither white nor black. But although that category was relegated to residuary status, it was endowed with no fewer than seven sub-categories. The first six were Cape Coloured, Cape Malay, Griqua, Chinese, Indian, and Other Asiatic. The seventh was again a residuary group to which those who belonged [illegible] were assigned. It was called Other Coloured.

Uhinenick: Not allow private apartheid in name of privacy.

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'So are you trying to be reclassified black?' I asked. It was unusual to try to move from a category of greater privilege to one of lesser privilege, but he might have been trying to restore links with family classified black, or perhaps making a protest against race classification. But he soon ruled out this possibility as well, and I decided that it was time to go back to basics.

'What is your present classification?' I asked.
'Coloured,' he replied.
'And how do you wish to be classified?' I proceeded.
'Coloured,' he answered again.

It was at that point that I realized we were in the shadowy realm of the sub-categories of 'Coloured'. Eventually it transpired that he was classified Other Coloured, and that he wished to become Cape Coloured.

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About twelve years ago, I used to give lectures on the South African race classification system. I used to have to explain that the system divided all South Africans into three major groups - white, black and coloured. Whites were defined, blacks were defined, and those who were called coloured were defined as people who were neither white nor black. But although that category was relegated to residuary status, it was endowed with no fewer than seven sub-categories. The first six were Cape Coloured, Cape Malay, Griqua, Chinese, Indian, and Other Asiatic. The seventh was again a residuary group to which those who belonged nowhere else were assigned. It was called Other Coloured.

After one lecture, a student of indeterminate race approached me. He explained that he wished to be reclassified, and that he wanted my help. The student was diffident, his English was poor, and he did not speak clearly. I had some difficulty making out what sort of reclassification he was hoping for. At first what he said led me to believe that he was classified coloured and was hoping to be reclassified white. That was a popular move to try to make, from a status of lesser privilege to one of greater privilege. But the student said he did not wish to be white. This I was relieved to hear, because it was clear from his appearance that under the racial tests then in force his application would have stood no chance of succeeding. What he went on to say encouraged me to believe that he was classified black and aspiring to be classified coloured. But he soon disabused me of that belief too.

'So are you trying to be reclassified black?' I asked. It was unusual to try to move from a category of greater privilege to one of lesser privilege, but he might have been trying to restore links with family classified black, or perhaps making a protest against race classification. But he soon ruled out this possibility as well, and I decided that it was time to go back to basics.

'What is your present classification?' I asked.
'Coloured,' he replied.
'And how do you wish to be classified?' I proceeded.
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It was at that point that I realized we were in the shadowy realm of the sub-categories of 'Coloured'. Eventually it transpired that he was classified Other Coloured, and that he wished to become Cape Coloured.

'Why do you want to do that?' I asked. 'How will it improve your legal position?' So far as I was aware, no legal consequences flowed from the distinction between Cape Coloured and Other Coloured. I might have been wrong, but if I was, that was entirely beside the point, for the student explained to me that his reason for seeking a reclassification was the humiliation of belonging to a residuary group within those called Coloured, which was itself a residuary group. It was of no moment that no legal consequences might attach to reclassification. What he wanted was to escape what for him was the ignominy, in a society mesmerized by racial identity, of being consigned to the racial residue of a racial residue.

I was shaken by this incident, because until it happened I had not appreciated quite how much power a legal classification could wield to shape extra-legal consciousness. The student was willing to expose himself to elaborate and intrusive administrative inquiries, and, indeed, to the costs and vagaries of litigation, not in the hope of obtaining any legal relief, but merely for the satisfaction of acquiring the imprimatur of what he considered to be promotion to a more dignified classification.

As statutory discrimination disappears, many of those who have relied all these years upon race classification to protect their interests are now anxious to carve out of our society a private sphere in which racial domination can continue to flourish. It is essential to appreciate what makes this strategy so promising for those using it. Statutory discrimination, and the system of race classification upon which it rested, has had a pervasive effect upon the outlook of all of us, an effect which has always been independent of its purely legal force. Because the effect is independent of the statutes, it is more than likely to survive the statutes. Indeed, the psychological hierarchy of race inculcated by statute is likely to prove to be the most tenacious feature of the order which is now discredited. And if those who are still secretly wedded to that order can only hive off from society viable enough hothouses in which to cultivate apartheid, the psychological hierarchy will be abundantly available as fertilizer.

The Law Commission

Signs of this strategy are visible all around, from suburbs trying to wall themselves off to the Oranje communities. Probably the most elaborate statement of the strategy is the Law Commission's latest proposal for a Bill of Rights, generally known as Olivier II.[1] The Law Commission proposes a provision in the Bill of Rights to outlaw legislation or governmental action which compels 'individuals or groups to associate with other individuals or groups'.[2] The object seems to be to protect

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[1] South African Law Commission Interim Report on Group and Human Rights (1991).

[2] Article 17, paragraph 7.263.

racially exclusive private associations from anti-discrimination legislation. The Law Commission qualifies its proposal by prohibiting public funding of racially exclusive individuals or groups if the purpose of the funding is 'to foster the creation or maintenance of ... discrimination or exclusion'. This qualification significantly dilutes its predecessor, which prohibited public funding 'to promote the interests of' a discriminatory individual or group.[3]

The new provision consequently restricts the prohibition. Whereas the predecessor in effect prohibited public funding of a discriminatory organization itself, the new one prohibits public funding only of its discriminatory activities.[4] A narrow prohibition like that invites evasion, for it will often be a matter of the utmost simplicity to rearrange the organization's internal finances to satisfy the prohibition. By assigning public funding to a non-discriminatory purpose, the organization will often be able to free private resources[5] to fund a discriminatory purpose. The effect would be to make the public in fact a funder of the discriminatory purpose.

A similar retreat is evident in the sphere of schooling. Olivier II proposes a new clause, to insulate from State intervention the autonomy of private schools not receiving State aid to discriminate in the admission of students, even on racial grounds.[6] And lest there remain any doubt about the Commission's general attitude to private discrimination, it asks, as though it were a rhetorical question, why an employer 'should be forced against his will to employ a person whose sexual orientation - for example a homosexual man or woman or a transvestite - is unacceptable to that employer personally'.[7] Certainly within the Law Commission, therefore, the movement to create a private sphere immune from anti-discrimination intervention is gathering rather than losing strength.

It is important to appreciate how drastic these proposals are. The idea that discrimination is in some loose sense more acceptable in the sphere we consider private than in the sphere we consider public has deep resonances with much of what happens in many legal systems. And the Law Commission is not slow to suggest that its proposals are in harmony with what prevails abroad. It cites, apparently with approval, the provisions on education of the Namibian Bill of Rights.[8] But although those

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[3] Paragraph 7.253.

[4] Paragraph 7.261.

[5] Which in the absence of public funding would often be required to finance a non-discriminatory priority.

[6] Article 21 (d) and (e), paragraph 7.206.

[7] Paragraph 8.46.

[8] Paragraph 7.200.

provisions expressly preserve private schooling, in loud contrast with the Commission's own proposals, they forbid racial selection not only of students, but also of staff.

Again, the Commission, in the context of a discussion of anti-discrimination legislation, says that its 'proposed Bill of Rights ... leaves the same latitude as that provided in the USA's Bill of Rights'.[9] It does not. The debate in United States constitutional law is about how far into the private sphere the equal protection clause of the fourteenth amendment reaches to outlaw discrimination.[10] The argument from the protection of the private sphere is used to limit the reach of the equal protection clause, which is itself an anti-discrimination law; and one of extraordinary power because it enjoys constitutional force and therefore annuls all decisions within its ambit with which it conflicts. No one doubts that beyond the limits of its reach, anti-discrimination intervention may continue in the form of legislation. Indeed the federal legislature has intervened in just that way, to attack private discrimination in accommodation, in employment, in schooling and in housing.[11]

What the Law Commission is proposing for South Africa is the obverse: not that the equality clause in our next Constitution should be limited so that it fails to reach private discrimination, and so that the work of undoing discrimination has to depend upon the legislative will, but that the Constitution should actively preclude the legislature, and the executive, from interfering with private discrimination. The Commission wants to use the Constitution to immunize private discrimination from government intervention. This is a radical proposal, and it proposes a profoundly intrusive constraint upon the ordinary powers of government.

Public and Private

Despite that, the Law Commission's proposals do very loosely rest upon a belief which animates much thinking elsewhere: the belief that discrimination is somehow more acceptable in the sphere we consider private than in the sphere we consider public. Although the Law Commission tries to build far more upon the foundation of that belief than do countries like America, the belief itself appears in some or other form in many countries which have tried to control discrimination. Sometimes it appears as a political argument, advocating legislative restraint in the enactment of anti-discrimination legislation.

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[9] Paragraph 8.93.

[10] See, for example, William B Lockhart, Yale Kamisar, Jesse H Choper and Steven H Shiffrin Constitutional Law 7 ed (1991) (hereafter cited Lockhart et al) chap 11; Laurence H Tribe Constitutional Choices (1985) chap 16.

[11] Civil Rights Acts of 1866, 1964 and 1968; see, e g, Runyon v McCrary 427 US 160 (1976); Jones v Alfred H Mayer Co 392 US 409 (1968).

Sometimes it takes the form of an argument of statutory or constitutional interpretation, advocating a restrictive construction of legislation or of a constitution. Sometimes it takes the form of an argument of policy, contending for a parsimonious exercise of administrative discretion. That it should therefore make an appearance in our constitutional debate in the ambitious form of an argument of constitutional principle, seeking to confine the powers to be given to the next Parliament, is therefore scarcely surprising; and we must not permit the very great burden which it is being asked to bear to distract attention from the fact that it is an argument taken very seriously in many legal systems.

Complicity

But upon what does the argument rest? In my view it rests upon two possible theories, which often come to us so entangled with one another that it is difficult to appreciate that they are distinct. The first is the complicity theory. That theory focuses on the question of what counts as public, and it states that what we should guard against most vigilantly is the complicity of the State, or anything that might be considered one of its organs, in discrimination. The Law Commission invokes the complicity theory when it requires private schools, to qualify for the constitutionally protected privilege of practising race discrimination, to eschew State funding.[12]

The complicity theory has great superficial appeal, and perhaps that is because it seems to draw sustenance from administrative law, which teaches that higher standards of propriety are expected in the decisions of public officials, just because they are public officials, than of private individuals. But the great difficulty in the way of the complicity theory is that when we examine legally tolerated discrimination, it is difficult to identify any in which the State is not implicated, even if only latently. Suppose, for instance, that I sue to challenge my exclusion on the ground of race from a private school. If the court rejects my challenge, whether it relies upon the constitution, or upon legislation, or upon the common law, it is implicated in upholding race discrimination. And when the court is implicated, as the U S Supreme Court recognized as long ago as 1948,[13] so, too, is the State.

The truth is that where private discrimination is tolerated, the role of the State as guarantor of private discrimination is concealed from view just because that role is so well understood that no one bothers to make the challenge. And there is another sense in which the State is always implicated: unless the Constitution bars interference with private discrimination, which itself is a conspicuous form of State complicity, then there must be some organ of State which could interfere. And a

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[12] Article 21, paragraph 7.206.

[13] Shelley v Kraemer 334 US 1 (1948).

passive failure to exercise power is also complicity.[14] Indeed, the very idea of legally tolerated discrimination entails that it is the law which is tolerating discrimination. And that entails that the State is implicated in discrimination.

The only escape from this conclusion is to try to identify some degree of complicity sufficient to engage the theory, and ignore any lesser degree of complicity. If we go that route, we will find ourselves asking whether the State is implicated when it grants tax relief to a discriminatory organization, or supplies it with police or fire protection, or even when its social welfare system supports an individual who practises discrimination. When the State's complicity is said to depend upon its role as landlord to a discriminatory business, we may find ourselves debating whether it should be decisive that the building housing the business flies the State flag.[15] In the end, the considerations which influence the finding of complicity become arbitrary, and the line between complicity and innocence vanishes into incoherence.

Choice

In trying to draw a line between what is public and what private, the complicity theory focuses upon the public: it aspires to keep public officials pure from the taint of responsibility for racism. But as long the law tolerates discrimination, they never can be. Suppose that we focus instead on the private, and ask why it is that the desire to retain a private sphere free of anti-discrimination intervention seems to surface, in one guise or another, universally? The answer usually given is that the individual's freedom to choose, free of any scrutiny, is something to be cherished. Let us call this the choice theory.

What is it that the choice theory seeks to preserve? To answer that, I think we have to examine what it is that anti-discrimination intervention tries to strike at. The most prominent targets of that kind of intervention now are discrimination on the grounds of race, gender and sexual orientation. The question is often asked, what is it that makes these kinds of discrimination objectionable; indeed, what is it that guides us to describe them as 'discrimination', with all the pejorative meanings that that word now carries, rather than differentiation, which is an innocent word, and without which no rational decisionmaking is possible? All decisionmaking, after all, requires us to differentiate between meritorious claims and unmeritorious ones, between worthy parties and unworthy.

The answer, very simply, is that discrimination, in the pejorative sense, is differentiation which is not justified. And even in South Africa it is no longer very controversial that

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[14] Allan C Hutchinson and Andrew Petter 'Private Rights / Public Wrongs: The Liberal Lie of the Charter' (1988) 38 U of Toronto LJ 278 at 285.

[15] Cf Burton v Wilmington Parking Authority 365 US 715 (1961).

differentiation on the grounds of race or gender or sexual orientation, unless it is designed to undo or mitigate the effects of prior discrimination, is for that reason alone unjustified. The influence of race or gender or sexual orientation upon the decision negatives any justification that it might otherwise have.

So when a case is made for a private sphere that preserves a freedom to discriminate, the goal is to establish an immunity from justification. The goal is to establish a preserve for arbitrariness, a sanctuary from any kind of need to explain or defend or account for one's decisions.

Do we want such a sanctuary? I think that there is an irreducible minimum that we have to retain unless we are to become the Orwellian nightmare. We have to retain freedom to choose whom we will befriend, whom we will invite into our homes, whom we will assist voluntarily, free absolutely of any need to justify our decisions. This is privacy in its intimate, and therefore its most concrete sense, and no real democracy could ever contemplate violating it.

But the choice theory takes this idea of privacy, and gives it a figurative, and often therefore an inflated, meaning. It may magnify it into an ideal which protects arbitrariness in far less intimate settings, such as schools, clubs, housing estates, employment and business. These are not domestic settings, although much of the rhetoric of the choice theorists is apt to suggest that they are. These are social institutions, and they have substantial social significance. If they are permitted to become havens of non-accountability, they will make a major contribution to the maintenance of racial domination, and other kinds of subordination.

The trick that the choice theorists often try to play on us is to argue from privacy, which we know that we absolutely have to preserve free from the need for justification, to the private sphere, which is smaller or bigger depending on how strong a choice theorist you are, and may be enlarged to encompass everything outside of government. The only defence against this kind of trickery is constantly to remind ourselves that what deserves protection is privacy, and then to ask whether what is seeking immunity from accountability really does deserve the protection of that idea.

Conclusion

To sum up: much of our constitutional discourse is influenced by the belief that discrimination is more acceptable in the private sphere than in the public. That belief is being required to bear far stronger arguments here than it does abroad. And the belief itself may depend upon either of two different theories. The complicity theory, if we follow its ramifications all the way through, eventually wipes out the private sphere altogether. If we do not follow it all the way through, the stopping point is likely to be arbitrary, and the boundary between public and private incoherent. The choice theory is therefore a better one. But the choice theory, properly understood, protects only what

can genuinely be considered privacy. We must guard against being deceived into allowing that theory to insulate institutions with great social influence from social accountability. A narrow focus on what really deserves protection yields a far smaller sphere of non-accountability than the one for which those who are trying to perpetuate apartheid are aiming.

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21 October 1992

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